

US EPA ARCHIVE DOCUMENT



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
NEW ENGLAND REGION
ONE CONGRESS STREET SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023**

**QUESTIONS and ANSWERS REGARDING FEDERAL BROWNFIELDS PROPERTY
LIABILITY**

This document has been created to provide information to municipalities, non-profits, private developers, and others regarding the acquisition of property under the Brownfields amendments to CERCLA enacted in January, 2002. The document was written in a 'question and answer' format to address common questions regarding CERCLA liability and to provide a beginning primer on that topic.

If you are seeking to acquire and redevelop brownfields property, it is important that you understand the liability provisions in CERCLA, and in particular, changes resulting from the new Brownfields amendments. It is important to understand the liability protection given to bona fide prospective purchasers under those amendments.

This document applies only to the federal brownfields program. Since liability protection is likely to be different under state programs, you are encouraged to investigate relevant state laws regarding brownfields. Contact your state brownfields coordinator.

For questions regarding applicant and site eligibility for EPA brownfields grant funding, the annual proposal guidelines for the individual programs should be reviewed. More detailed information on CERCLA liability is available from EPA and is referenced in the document. For site-specific questions, you are encouraged to contact your own legal counsel; you may also direct questions to the Legal Counsel for the Brownfields Team in EPA New England's Office of Regional Counsel.

I. TERMS

1. Who is a potentially responsible party or PRP?

Potentially responsible parties or PRPs are liable under CERCLA for the cleanup costs at a site. PRPs include:

- ▶ Current owners and operators
- ▶ Owners and operators of the facility at the time of disposal of hazardous substances
- ▶ Generators of the hazardous substances
- ▶ Transporters and disposers of the hazardous substances

November, 2003

The law prohibits EPA funds awarded through the national brownfields competition from being used to provide grants or loans to PRPs who do not meet the requirements for liability protection under the Brownfields amendments enacted in January, 2002.

2. What is a bona fide prospective purchaser?

The term “bona fide prospective purchaser” or BFPP is defined in CERCLA. A bona fide prospective purchaser is a person¹ who acquires ownership of a facility after January 11, 2002, who can establish the following facts and perform the required continuing obligations:

- ▶ all disposal of hazardous substances occurred prior to acquisition of the property
- ▶ appropriate inquiry into previous owners and uses of the property was made prior to acquisition of the property
- ▶ the owner provides all legally required notices with respect to the hazardous substances found on the property
- ▶ the owner exercises appropriate care by taking reasonable steps to
 - stop any continuing release
 - prevent any threatened future release
 - prevent or limit human, environmental or natural resource exposure to previously released hazardous substances
- ▶ the owner provides full cooperation, assistance, and access to those authorized to conduct a response action or natural resource restoration
- ▶ the owner complies with all land use restrictions and does not impede the effectiveness of any institutional controls at the facility
- ▶ the owner complies with information requests and administrative subpoenas under CERCLA
- ▶ the owner is not potentially liable for response costs and is not affiliated with a PRP through a family or financial relationship

3. What is appropriate inquiry?

In order to receive protection from liability as a bona fide prospective purchaser, PRIOR to purchasing the property, a purchaser must perform all appropriate

¹Under CERCLA, the term “person” includes but is not limited to entities such as corporations, municipalities, States, political subdivisions of States, commissions, and interstate bodies.

inquiry into the previous ownership and uses of the property.² The procedures delineated in the document published by the American Society for Testing and Materials (ASTM) entitled Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process satisfy the requirement to perform appropriate inquiry.³

4. What are reasonable steps?

In order to receive the benefit of some of the liability protections in CERCLA, the property owner must exercise appropriate care by taking reasonable steps to stop continuing releases, to prevent threatened future releases, and to prevent or limit exposure to earlier releases of hazardous substances. If you are a bona fide prospective purchaser, you are required to take reasonable steps to maintain protection from CERCLA liability.

What constitutes reasonable steps depends on the facts of each site. For example, reasonable steps may include actions such as removal of drums, securing of the site through fencing and/or other means, appropriate signage warning of the danger, etc.⁴ Reasonable steps will be very site-specific.

At this time, the Agency does not intend to determine or approve reasonable steps at most brownfield sites. It is a concept that will be interpreted in the courts. EPA believes that the existing case law interpreting due care provides a reference point for understanding the requirement to exercise appropriate care by taking reasonable steps.

If you have questions, please contact the EPA New England Brownfields Team so that you can be referred to the appropriate Agency staff.

5. How does the bona fide prospective purchaser designation impact a municipality or potential developer?

A bona fide prospective purchaser is not liable under CERCLA for cleanup costs at a site. A municipality or potential developer who meets the definition and continuing obligations of a bona fide prospective purchaser may purchase contaminated property without incurring CERCLA liability.

²This is an interim standard. The Brownfields Amendments require EPA to promulgate standards of "all appropriate inquiry" by regulation no later than January 11, 2004.

³Either the 1997 or 2000 ASTM standard can be used to fulfill the requirement.

⁴See *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements"), Appendix B, Reasonable Steps Questions and Answers.*

However, if EPA has unrecovered response costs incurred in cleaning up that property and the EPA response action increases the fair market value of the property, EPA may have a **windfall lien**⁵ on the property.

The statute defines a windfall lien to be a CERCLA statutory lien on property for the increase in fair market value of that property that is attributable to cleanup efforts by EPA. The value of the lien is limited to the lesser of EPA's unrecovered response costs or the increase in fair market value. The lien applies to properties acquired by bona fide prospective purchasers.

If you have any questions concerning the definition of windfall liens or the potential applicability to properties you are considering purchasing, you should seek legal counsel. You may also contact the Legal Counsel to the EPA New England Brownfields Team for further information.

6. What is an involuntary acquisition?

Involuntary acquisitions are transfers to the government in its capacity as a sovereign. The municipality's ownership interest exists only because an action of a third party has given rise to a property right on behalf of the government.

Municipalities who have not caused or contributed to the release or threat of release of a hazardous substance on the property are not liable as owners or operators under CERCLA if they have acquired the property involuntarily. Methods of involuntary acquisition include bankruptcy, tax delinquency, abandonment, seizure, forfeiture, escheat⁶.

Property donated to the municipality is **not** considered an involuntary acquisition. Eminent domain is **not** considered an involuntary acquisition. However, government entities who acquire property through eminent domain and who exercise due care after the acquisition may have an affirmative defense to liability as owners under CERCLA.

7. How does acquiring property through eminent domain affect potential CERCLA liability?

Eminent domain is a function of government. It is a government's authority to take private property for public use. The property is taken either by purchase or condemnation.

Municipalities and other government entities who acquire property through the exercise of eminent domain authority may have a defense to liability as owners

⁵See *Interim Enforcement Discretion Policy Concerning "Windfall Liens" under Section 107(r) of CERCLA* issued by U.S. Environmental Protection Agency and U.S. Department of Justice, 2003.

⁶Escheat is the reversion of property to the state in the absence of legal heirs or other claimants.

under CERCLA if, after they acquire ownership, they exercise due care and take precautions against foreseeable acts.

8. What is due care?

Due care is a legal term defined by courts. In general, due care requires that the municipality take all reasonable precautions with respect to the wastes found at the site; the municipality must consider all relevant facts and circumstances in deciding what precautions to take. Whether actions taken by a municipality are reasonable precautions constituting due care depends on the specific conditions of the site in question.

Some examples of the exercise of due care found in case law include notifying state and federal environmental agencies, identifying and assessing the contamination found at the site, controlling exposure to the contamination, notifying tenants, abutters, and the public about the potential hazards and the actions that can be taken to prevent exposure.

Some examples of the failure to exercise due care found in case law include taking no action upon learning about the contamination, failing to investigate and assess the contamination after learning of its existence, failing to prevent the spread of the contamination, and failing to warn others about the danger.

II. GENERAL QUESTIONS

1. What concerns should a municipality address before purchasing property that is or may be contaminated?

Because owners of contaminated property may be liable under CERCLA and therefore ineligible to receive brownfields grant money, municipalities must ensure that they are acquiring property in a manner that confers CERCLA liability protection.

Before purchasing property that is or may be contaminated, the municipality should be familiar with the definition of a bona fide prospective purchaser. If the municipality meets the definition of a bona fide prospective purchaser, it must also fulfill the continuing obligations delineated in the law to be protected from CERCLA liability.

In order to be a bona fide prospective purchaser, the municipality must have purchased the site **after** the disposal of the hazardous substances and **after** January 11, 2002. In addition, prior to purchasing the property, the municipality must have made **all appropriate inquiry** into the previous ownership and uses of the site. The procedures of the 1997 or 2000 ASTM standard for Phase I environmental site assessments satisfy the requirement for appropriate inquiry

2. When must the appropriate environmental site assessment be performed?

The environmental site assessment must be performed on or before the effective date of the property transfer.

3. Can an environmental site assessment performed by a seller's consultant be used to meet the site assessment requirement?

Although at this time, there is no legal prohibition against using a site assessment performed by the seller's consultant, the site assessment must use procedures equivalent to the procedures delineated in American Society for Testing and Materials Standard E1527-97 entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" or in the updated 2000 version of that standard.

For the purposes of Brownfields grant applications submitted in Fall, 2003, as a matter of policy, the New England Region will review applications including Phase I site assessments consistent with the statutory requirements that have been performed within a year of the submittal of the application. However, if as a buyer, you are concerned about potential CERCLA liability issues, you may want to hire a consultant to perform a site assessment for you as the buyer that is consistent with the requirements of the statute.

The Agency is in the process of conducting a negotiated rule-making in connection with the statutory mandate to provide standards and practices clarifying the requirements to carry out all appropriate inquiry no later than January 11, 2004. In the interim, if you have any questions concerning the Phase I site assessment process, please contact the Brownfields Team in the New England Region.

4. If a municipality takes property using a deed in lieu of foreclosure, is the municipality exempt from CERCLA liability?

At this time, for the purposes of the Brownfields grant programs, EPA generally has interpreted the CERCLA liability exemption for property acquired by a municipality through tax delinquency to apply only to property acquired through the formal foreclosure process delineated in the relevant state law. Therefore, if you have acquired property through a deed in lieu of foreclosure, you may be liable unless you meet one of the other exemptions or defenses to CERCLA liability. Site-specific factors will be important in the final decision of the Agency.

5. What concerns should a municipality address after purchasing contaminated property?

Assuming that the municipality meets the pre-purchase requirements of a bona fide prospective purchaser, after purchasing the property, the municipality must meet the continuing obligations delineated in the law. If you fail to meet the continuing obligations, you may become liable under CERCLA. See Question 2

for a list of the continuing obligations necessary to maintain status as bona fide prospective purchaser.

6. What concerns should a municipality address after acquiring property through an involuntary acquisition?

Municipalities acquiring property through an involuntary acquisition are not liable as owners or operators under CERCLA as long as the municipality has not caused or contributed to the release or threat of release of a hazardous substance. If the municipality causes or contributes to the release or threat of release of a hazardous substance, then the municipality does not receive the benefit of the liability protection.

7. What concerns should a municipality address before taking property by eminent domain?

After a government entity acquires property through the exercise of eminent domain, it will have a third party defense to CERCLA liability if all requirements to that defense are met. The requirements include the following:

- ▶ the municipality acquired the property **after** the disposal or placement of hazardous substances at the facility
- ▶ the municipality did not cause, contribute to, or exacerbate the contamination
- ▶ the municipality exercised due care with respect to the contamination at the facility
- ▶ the municipality took precautions against certain acts of the party that caused the contamination and against the consequences of those acts

In order to maintain the ability to use the defense to liability, the law also requires municipalities to cooperate with those performing the cleanup, to provide access to the property to those performing the cleanup, to be in compliance with all land use restrictions, and not to impede the effectiveness or integrity of any institutional control employed in connection with a response action at the site.